

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

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| In the Matter of: |) | Docket No. 98-SIT-4 |
| |) | |
| Otay Mesa Generating Company, LLC |) | COMMITTEE PROPOSED DECISION |
| Petition for Jurisdictional Determination |) | RE: NOI EXEMPTION |
| |) | |
| _____ |) | |

I. THE PROJECT

Otay Mesa Generating Company, LLC (Petitioner) proposes to construct and operate a 1,050 megawatt (MW) natural gas-fired combined cycle power plant that is a market-based response to the creation of the California Power Exchange (PX). The proposed project will be located in San Diego County at Otay Mesa near the border of San Diego and Tijuana, Mexico. Petitioner will participate in the competitive electricity marketplace and expects to sell all or a portion of its energy, reliability, and ancillary services to the PX and the California Independent System Operator (ISO).

II. PROCEDURAL HISTORY

On September 14, 1998, Petitioner filed a "Petition for Jurisdictional Determination" requesting that the Commission find its Otay Mesa Generating Project eligible for an exemption from the Notice of Intention (NOI) requirements of Public Resources Code (PRC) section 25502.1. Petitioner asserts that its project conforms with the provisions of PRC, § 25540.6(a)(1) which exempts certain power plant projects from the NOI process.

By Notice dated October 19, 1998, the Energy Facility Siting Committee scheduled a hearing on November 10, 1998 to consider the Petition. In accord with Commission

¹ Petitioner previously received an NOI exemption for an earlier version of the project. (Docket No. 96-SIT-1). The current request does not rely on the previous exemption; rather, it seeks a new exemption since the project has been modified from the earlier 500 MW proposal that was based on bilateral power sales contracts to the presently proposed 1,050 MW project that will sell electricity and ancillary services to the PX and ISO.

regulations,² the Committee served the Notice and Petition upon the individuals, organizations, and businesses identified by Petitioner as "interested parties," as well as upon other persons and entities appearing on other pertinent mailing lists. The Notice directed all entities wishing to participate in the proceeding to file written statements by November 5, 1998. The Notice also directed Petitioner to provide responses to several inquiries regarding its assertion that the proposed project qualifies for an NOI exemption. Petitioner timely filed its responses as sworn testimony. Commission Staff also filed a statement pursuant to the Notice. No other comments were filed.

On November 4, 1998, the Commission declared certain findings in the *Blythe Energy* Decision as precedential for NOI exemption proceedings.³ In that Decision, the Commission also indicated that Petitions for NOI exemptions may be reviewed on the basis of sworn testimony in lieu of evidentiary hearings. Consequently, on November 10, 1998, the Committee issued a Notice canceling the November 10th evidentiary hearing on this Petition, and rescheduled the hearing before the full Commission at its Business Meeting on December 2, 1998.

On November 20, 1998, the Committee issued this Proposed Decision which is based on the sworn testimony filed by Petitioner, as well as the statement submitted by Staff. The Proposed Decision was served on Petitioner and all interested parties for review and comment prior to the Commission's December 2 hearing on the matter.

III. APPLICABLE LAW

A. Statutory Requirements.

Public Resources Code section 25502 provides in pertinent part that:

Each person proposing to construct a thermal power plant...shall submit to the commission a notice of intention [NOI] to file an application for the certification of the site and related facility or facilities.⁴

² Cal. Code of Regs., tit. 20, § 1232.

³ Docket No. 98-SIT-2; CEC Publication No. P800-98-004.

⁴ The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a))

The purpose of the NOI is to provide an open planning process in which the project proponent, interested agencies, and members of the public have an opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The NOI process also reviews whether a proposed project conforms with the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process is a prerequisite to the second stage of power plant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, *exempts* certain projects from the NOI process and allows them to proceed directly to the AFC stage.⁵ Projects eligible for this expedited licensing process include:

...a thermal power plant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, § 25540.6(a)(1).)⁶

Petitioner contends its proposed project fits within this provision.

B. Policy Guidance.

The Commission has authority to interpret pertinent statutory or regulatory provisions. Typically, such Commission policy is expressed in its biennial Electricity Report (*ER*), the most recently adopted of which is controlling for power plant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired power plants which are the result of competitive solicitations or negotiations, we will continue our process [announced in the Addendum to *ER* 94] for granting exemptions from NOI requirements to such projects. (*ER* 96, p. 75, Endnote 1).

⁵ The AFC process anticipates *a final* licensing decision within 12 months of filing an application. See, PRC, § 25540.6(a).

⁶ PRC, § 25540.6 lists several specific NOI exemptions that include: cogeneration, solar, modification of a specific facility, less than 100 MW, and demonstration projects.

The policy expressed in *ER 94* and the Addendum to *ER 94* supported the development of a competitive market in the production and sales of electricity. The Addendum clarified Commission policy on legislation amending Section 25540.6 to allow NOI exemptions for natural gas-fired projects that are "the result of a competitive solicitation or negotiation." (AB 1884; Statutes of 1993).⁷ In the Addendum, the Commission expressed its preference for a "...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'."⁸ In *ER 96*, the Commission expanded the views contained in *ER 94* and the *ER 94* Addendum to encourage the development of merchant power plants that participate in the newly emerging electricity marketplace without the benefit of ratepayer guarantees. (*ER 96* at pp. 71-72). Until the *Blythe Energy* Decision was issued, formal Commission policy on NOI exemptions was limited to these Electricity Reports.⁹

C. Precedential Decision

In *Blythe Energy*, the Commission further interpreted the scope of its policies pertaining to NOI exemptions, and determined that a natural gas-fired merchant project which proposes to sell its power in the competitive electricity market, and does not put ratepayers at risk, would generally be eligible for an NOI exemption. The Commission declared the following Findings as *Precedent*:¹⁰

- 1) The Commission adopted an "Addendum to the 1994 Electricity Report" on February 14, 1996.

⁷ The Legislative Counsel's Digest for AB 1884 states that the amendments were intended to change the statute to conform to the present-day competitive marketplace of energy development. "...[T]he siting provisions of the Act were written at a time when large baseload powerplants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent." (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*bid* 8/27/93 Senate Analysis).

⁸ *ER 94* Addendum, Revision 1, p. 2.

⁹ See, *Blythe Energy*, pp 3-6 for a more complete discussion of the NOI exemption policies contained in *ER 94* and *ER 96*.

¹⁰ *Blythe Energy*, pp. 18-19.

- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (ER) which continued the policies set forth in ER 94 and in the Addendum.
- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient "competitive auction" open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).

In addition, the Commission found that power sales to the PX are the “result of a competitive solicitation or negotiation for new generation resources” within the meaning of PRC, § 25540.6(a)(1).¹¹ This finding includes natural gas-fired projects that sell power to other power exchanges and/or wholesale, and/or retail marketers, and/or direct access power markets, and/or other power consumers.¹²

IV. EVIDENCE OF RECORD

The *Blythe Energy* Decision provides that a Petitioner may establish eligibility for an NOI exemption by filing sworn testimony in response to certain specific inquiries enumerated in that Decision.¹³ In consideration of the issues raised in the instant Petition, the Committee directed Petitioner to respond to those inquiries as follows:¹⁴

¹¹ Commission Order adopting *Blythe Energy* (Order No. 98-1104-04); see also, *Blythe Energy*; pp. 17-18.

¹² *Ibid.*

¹³ *Id.*, fn. 27 at p. 18.

¹⁴ See, October 19, 1998, Notice of Committee Hearing.

1. Does Petitioner contend that the PX process constitutes a “competitive solicitation or negotiation?” If so, on what basis?
2. Provide evidence to establish that Petitioner’s prospective project is “the *result* of a competitive solicitation or negotiation.”
3. Describe the specific nexus between the particular project proposed by Petitioner and the PX’s solicitations for “day ahead” and “hourly bids.” How is the proposed project anticipated to perform under both scenarios?
4. Is it Petitioner’s position that its proposal to develop a merchant power plant to sell energy through the PX creates an irrebuttable presumption that such proposal is the “result of a competitive solicitation or negotiation?”
5. Is Petitioner negotiating with any other potential power purchasers or power exchanges?
6. What is Petitioner’s registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner’s plans regarding registration and negotiation for a “PX Participation Agreement?”
7. Identify Petitioner’s principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
8. Describe Petitioner’s experience and assets with regard to power generation acquisition, and power plant development, ownership, and operation.
9. Describe the specific location where the project will be constructed, and describe Petitioner’s site selection criteria that led to this particular site location.
10. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural gas-fired power plant.
11. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
12. Explain how Petitioner's negotiations will be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. Petitioner responded to the inquiries in its November 5, 1998, statement to the Committee. The responses were executed under penalty of perjury by Kent Fickett, Senior Vice President for Strategic Initiatives of US Generating Company, the indirect parent company of Otay Mesa Generating Company. Under *Blythe Energy*, responses

that reflect the Commission's policy with regard to inquiries 1, 2, and 4 do not require further consideration. Regarding the remaining inquiries, the Committee reviewed the sworn responses as submitted by Petitioner in lieu of an evidentiary hearing, and based its Findings and Conclusions upon the evidence contained in that submittal.

Staff. Staff agreed with Petitioner's assertions that the proposed merchant project is a natural gas-fired power plant that meets the statutory test for being the result of a competitive solicitation. (Staff Statement filed November 3, 1998). Staff expressed its belief that existing Commission policy and previous NOI exemption cases support such a conclusion.¹⁵ (*Ibid.*)

There were no other comments or other evidence filed in this matter.

V. FINDINGS and CONCLUSIONS

Based upon the precedent established in *Blythe Energy*, and in the absence of any contravening evidence, the Committee finds that Petitioner's proposed project is the "result of a competitive solicitation or negotiation" within the meaning of PRC, § 25540.6(a)(1).

Based on the totality of the record, we make the following findings and conclusions:

- 1) Petitioner filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the *ER 94 Addendum*, *ER 96*, and the *Blythe Energy Decision*, and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 2) Petitioner is a special purpose limited liability company established by its indirect owner, US Generating Company, LLC (US Gen) to develop, construct, and operate the Otay Mesa Generating Project. US Gen, one of four subsidiaries of PG&E Corporation, is an independent power producer that has developed 12 power plant projects throughout the U.S. Its assets also include the J. Makowski Company's five natural gas-fueled plants in New England, as well as the New England Electric System's 15 hydro and three fossil fuel power plants with total generating capacities of 1,200 megawatts (MW) and 2,800 MW, respectively. Revenues from US Gen's electricity sales in 1997 exceeded \$1 billion.

¹⁵ Staff cites the Commission's Decision in *La Paloma* and cases cited therein. (98-SIT-1; CEC Publication No. P800-98-003).

- 3) Petitioner proposes to construct a natural gas-fired combined cycle power plant, nominally rated at 1,050 megawatts (MW). The project will consist of four power islands, each of which will generate approximately 263 net MW. Major equipment on each power island includes: a natural gas-fired combustion turbine; a heat recovery steam generator (HRSG); a steam turbine; and a cooling tower system.
- 4) The power plant will be located in San Diego County at Otay Mesa, near the border of San Diego and Tijuana, Mexico. The plant site is a 48-acre parcel located on Alta Road one-quarter mile north of the intersection of Alta Road and Otay Mesa Road.
- 5) Petitioner began development of this project in response to a 1992 competitive solicitation by SDG&E. The project evolved with the creation of the California Power Exchange (PX) and Petitioner continued to focus its project development on serving the energy needs of San Diego County, as well as the State of California. Petitioner chose the Otay Mesa site for its accessibility to transmission lines (adjacent to the Tijuana-Miguel 230 kV transmission line that interconnects with SDG&E's transmission grid); gas lines (less than a mile from SDG&E's gas pipeline 2000 project); water supply (the Otay Water District); sewer system (1.5 mile sewer line to the San Diego Metropolitan sewer system); zoning (project included in San Diego County General Plan); and favorable community support (industrial development is consistent with General Plan).
- 6) The Otay Mesa site is located in the San Diego Simultaneous Import Limit (SIL) area which has limited power import capability. Transmission into the San Diego area may become congested as demand exceeds the SIL under certain peak load conditions. Petitioner will compete for "reliability must run" (RMR) contracts solicited by the California Independent System Operator (ISO) to displace power imports and relieve transmission congestion in the area.
- 7) The proposed Otay Mesa Generating Project is a merchant project that does not put ratepayers at risk. Petitioner's project development in the competitive market is not dependent on long term power service agreements with regulated utilities or other ratepayer guarantees.
- 8) The proposed power plant project is a market-based response to the creation of the PX, and will be operated to sell some or all of its electricity output to the PX and the ISO. The project expects to provide energy, reliability, and ancillary services into the competitive electricity market.
- 9) Petitioner has access to the PX market through its affiliates, PG&E Energy Services and PG&E Energy Trading, who are registered with the PX or, in the alternative, Petitioner will sell power directly to the PX upon registration as a participant.

We conclude, therefore, that Petitioner's proposed natural gas-fired power plant project is the "result of competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the findings reached above and factors discussed elsewhere in this Decision, and based on the precedent established in the *Blythe Energy* Decision, the Otay Mesa Generating Project qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: _____

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

ROBERT A. LAURIE
Commissioner and Presiding Member
Energy Facility Siting Committee

DAVID A. ROHY, Ph.D.
Vice Chair and Associate Member
Energy Facility Siting Committee

APPENDIX A

EVIDENCE OF RECORD

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

| | | |
|--|---|----------------------------|
| In the Matter of |) | |
| |) | Docket No. 98-SIT-4 |
| Otay Mesa Generating Company, LLC |) | |
| Request for Jurisdictional |) | COMMITTEE |
| PROPOSED |) | |
| Determination |) | DECISION |
| _____ |) | |

EVIDENCE OF RECORD

| <u>Date</u> | <u>Document</u> |
|--------------------|--|
| September 14, 1998 | Petition for Jurisdictional Determination filed by Otay Mesa Generating Company, LLC |
| November 3, 1998 | Energy Commission Staff Statement filed by Energy Commission Staff |
| November 5, 1998 | Responses to Energy Facility Siting Committee's Inquiries 1 through 12, filed by Otay Mesa Generating Company, LLC. Written testimony filed under penalty of perjury |

APPENDIX B

PROOF OF SERVICE LIST